

In the
Supreme Court of the United States

HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC., ET AL.,
Applicants,

v.

NATIONAL HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION, ET AL.,
Respondents.

On Application for Stay of the Mandate of the
United States Court of Appeals for the Fifth Circuit

**BRIEF OF THOROUGHBRED INDUSTRY PARTICIPANTS
AS AMICI CURIAE IN SUPPORT OF APPLICANTS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
A. HISA Substantially Improves The Regulatory Landscape For Thoroughbred Horseracing	3
B. The Fifth Circuit’s Facial Invalidation Of HISA’s Enforcement Provisions Threatens Substantial Harm To The Thoroughbred Industry	9
CONCLUSION.....	14
APPENDIX: List of Amici Curiae	15

TABLE OF AUTHORITIES

	Page(s)
<i>Barry v. Barchi</i> , 443 U.S. 55 (1979)	7
<i>Bowen v. Kendrick</i> , 483 U.S. 1304 (1987)	13
<i>Farina v. Ohio State Racing Commission</i> , 145 N.E.3d 1108 (Ohio Ct. App. 2019).....	5
<i>FCC v. Fox Television Stations, Inc.</i> , 567 U.S. 239 (2012)	7
<i>Moody v. NetChoice, LLC</i> , 144 S. Ct. 2383 (2024)	10
<i>Oklahoma v. United States</i> , 62 F.4th 221 (6th Cir. 2023), <i>cert. denied</i> , 144 S. Ct. 2679 (2024)	3, 4, 9
<i>Walmsley v. FTC</i> , — F.4th —, 2024 WL 4248221 (8th Cir. Sept. 20, 2024)	3, 9

STATUTES AND REGULATIONS

15 U.S.C. §§ 3051-3060.....	1
15 U.S.C. § 3051(4)-(8).....	1
15 U.S.C. § 3052.....	7
15 U.S.C. § 3053.....	7
15 U.S.C. § 3053(b)	7
15 U.S.C. § 3053(e).....	8
15 U.S.C. § 3054(b)	11
15 U.S.C. § 3054(e)(2)(A)	11
15 U.S.C. § 3054(k)	11
15 U.S.C. § 3055(c)(1)	7
15 U.S.C. § 3056(b)(2).....	7

	Page(s)
15 U.S.C. § 3056(b)(4)	7
15 U.S.C. § 3057(b)(1)	7
15 U.S.C. § 3057(c)(1)(B)	7
15 U.S.C. § 3057(c)(2)	8
15 U.S.C. § 3057(c)(3)	8
15 U.S.C. § 3057(d)(1)	7
15 U.S.C. § 3058.....	7, 8
16 C.F.R. § 1.142(f)	7

OTHER AUTHORITIES

166 Cong. Rec. H4981 (daily ed. Sept. 29, 2020)	6
166 Cong. Rec. H4982 (daily ed. Sept. 29, 2020)	4
166 Cong. Rec. S5514 (daily ed. Sept. 9, 2020).....	6
88 Fed. Reg. 5070 (Jan. 26, 2023)	12
88 Fed. Reg. 27,894 (May 3, 2023)	8, 13
C.L. Brown, <i>Horse Racing Needs Unity, but Road to Getting There May Be Long as Battles Continue</i> , Louisville Courier Journal (July 9, 2024), https://perma.cc/KR9G-9A6E	9
Chuck Culpepper, <i>Medina Spirit, the Kentucky Derby Winner, Heads into the Preakness Under a Cloud After Drug Test</i> , Wash. Post (May 10, 2021), https://wapo.st/3sfSAv6	6
Joe Drape, <i>Justify Failed a Drug Test Before Winning the Triple Crown</i> , N.Y. Times (Sept. 11, 2019), https://nyti.ms/3AE9S8l	6
Joe Drape, <i>Santa Anita Park’s Death Toll Reaches 30 Racehorses</i> , N.Y. Times (June 22, 2019), https://nyti.ms/3saVJfZ	6
FTC, <i>Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority</i> (Mar. 27, 2023), https://perma.cc/2SJ3-MBA9	8

	Page(s)
FTC, <i>Order Ratifying Previous Commission Orders as to Horseracing Integrity and Safety Authority’s Rules</i> (Jan. 3, 2023), https://perma.cc/6NKY-DRUV	8
Gus Garcia-Roberts, <i>Officials Worked Secretly to Clear Bob Baffert’s Justify Amid 2018 Triple Crown Run, Records Show</i> , Wash. Post (June 29, 2021), https://wapo.st/3fY0gh0	5
H.R. 2651, <i>Horseracing Integrity Act of 2017: Hearing Before the Subcomm. on Digital Com. & Consumer Prot. of the H. Comm. on Energy & Com.</i> , 115th Cong. (2018), https://bit.ly/3iH8oE4	4
H.R. Rep. No. 116-554 (2020)	4
Alicia Hughes, <i>HISA Claiming Rules Bring Horses Consistent Protection</i> , BloodHorse (Mar. 11, 2024), https://perma.cc/MA3Y-QAUV	5
Jockey Club, <i>Vision 2025: To Prosper, Horse Racing Needs Comprehensive Reform</i> (2019), https://bit.ly/2Uf8FF3	4
<i>Legislation to Promote the Health and Safety of Racehorses: Hearing Before the Subcomm. on Consumer Prot. & Com. of the H. Comm. on Energy & Com.</i> , 116th Cong. (2020), https://bit.ly/3s3g4HY	5, 6
Nat’l Thoroughbred Racing Ass’n, <i>Thoroughbred Industry Reiterates Support of HISA</i> , Past the Wire (July 13, 2023), https://perma.cc/5VLK-4F5G	8
Press Release, Horseracing Integrity & Safety Auth., <i>HISA Makes Significant Strides in First Year of Implementation</i> (July 11, 2023), https://bit.ly/3Qwv5wa	9
Press Release, U.S. Attorney’s Office for the Southern District of New York, <i>Manhattan U.S. Attorney Charges 27 Defendants in Racehorse Doping Rings</i> (Mar. 9, 2020), https://bit.ly/3jKZ6q4	6
Dan Ross, <i>Lucinda Finley Q&A on the Fifth Circuit Bombshell</i> , Thoroughbred Daily News (July 7, 2024), https://perma.cc/J2WT-KFG6	12
Natalie Voss, <i>Spike in Corticosteroid Tests Highlights Growing Pains in New Mexico</i> , Paulick Report (Feb. 21, 2019), https://bit.ly/3zcKt5w	5

INTEREST OF AMICI CURIAE¹

Amici curiae are 30 owners, breeders, trainers, jockeys, and other participants in the Thoroughbred horseracing industry. With decades of collective experience among them, amici have had the privilege of working with—and caring for—some of the finest Thoroughbreds in the world, often at the pinnacle of the sport. While their connections to Thoroughbred horseracing are diverse, amici all share an unyielding commitment to the integrity of the sport and its continued success, including the health and safety of the horses on which the sport depends. A complete list of amici can be found in the appendix to this brief.

In this case, the Fifth Circuit held that the enforcement provisions of the Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051-3060 (HISA or Act), are facially unconstitutional. Because amici have been “engaged in the care, training, or racing of” “Thoroughbred horse[s],” 15 U.S.C. § 3051(4)-(8), they are governed by HISA’s regulatory framework and thus have a substantial interest in ensuring that this framework remains in place pending further review by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Passed with bipartisan support in Congress and signed into law by President Trump in 2020, HISA reflects a landmark achievement for the sport of Thoroughbred horseracing, bringing nationwide regulatory reform to a national sport that desperately needed it. Before HISA, Thoroughbred horseracing was a national sport

¹ No counsel for a party authored this brief in whole or in part; and no party, counsel for a party, or person or entity other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

laboring under an unsustainable patchwork of state-by-state regulations governing medication control and racetrack safety. This patchwork not only subjected participants to arcane and often conflicting rules and unpredictable enforcement regimes of 38 different racing jurisdictions, but it prevented industry-wide responses to a series of high-profile controversies that threatened to tarnish the sport's reputation.

HISA addresses that Balkanized situation by calling for nationally uniform medication-control and racetrack-safety regulations to be promulgated and enforced by the Federal Trade Commission (FTC) with the assistance of the Horseracing Integrity and Safety Authority (Authority). The legislation's focus on uniformity and fairness dramatically improves the pre-HISA regulatory disarray while staying within constitutional bounds, which is why the Thoroughbred industry overwhelmingly supported it, two bipartisan Congresses and two presidential administrations have embraced it, and two courts of appeals have upheld it against constitutional attack. And after two years of implementation, this regime is firmly embedded into the Thoroughbred industry and is already yielding substantial benefits—racetrack conditions are improving, equine fatality rates are declining, and wagers from racing fans are increasing. HISA is thus on track to not only preserve but strengthen Thoroughbred horseracing.

The Fifth Circuit, however, has invalidated this duly enacted legislation by finding a non-delegation problem in HISA's enforcement provisions—one of the few times in history that a court has invalidated federal legislation on non-delegation

grounds. As explained by the Authority applicants and the federal government respondents, the Fifth Circuit’s decision is wrong several times over; directly conflicts with the Sixth and Eighth Circuits’ decisions in *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024), and *Walmsley v. FTC*, — F.4th —, 2024 WL 4248221 (8th Cir. Sept. 20, 2024); and warrants immediate correction by this Court.

In the meantime, however, it is imperative that this Court stay the Fifth Circuit’s mandate while this litigation plays out. The Fifth Circuit’s facial invalidation of HISA’s enforcement provisions will unravel the entire regulatory regime, and there is no reason to allow that to happen before this Court has had a chance to review the Fifth Circuit’s outlier decision. Indeed, without a stay of the mandate, the Fifth Circuit’s decision would produce nationwide confusion in the Thoroughbred industry while also creating huge gaps and disparities in the enforcement of critical health and safety regulations, threatening irreparable harm to Thoroughbred racehorses and those who ride them. Given these damaging consequences, the Court should stay the Fifth Circuit’s mandate and maintain the status quo during the pendency of these proceedings.

ARGUMENT

A. HISA Substantially Improves The Regulatory Landscape For Thoroughbred Horseracing

1. Thoroughbred horseracing is a national sport, and the “health and safety [of the] horses and jockeys,” as well as the competitive integrity of the races, all depend on a functioning regulatory regime governing medication usage and

racetrack standards. *Oklahoma v. United States*, 62 F.4th 221, 226 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024). Indeed, given the numerous “risks associated with unsafe tracks and doping,” such regulations are “imperative.” *Id.*

Before HISA, these critical aspects of the sport were “regulated independently by each of the 38 States in which the sport is legal.” H.R. Rep. No. 116-554, at 18-19 (2020). The “38 different state [regulatory] agencies” had “varying levels of funding, expertise, and experience.” *H.R. 2651, Horseracing Integrity Act of 2017: Hearing Before the Subcomm. on Digital Com. & Consumer Prot. of the H. Comm. on Energy & Com.*, 115th Cong. 57 (2018), <https://bit.ly/3iH8oE4> (statement of Craig Fravel, CEO, Breeders’ Cup Ltd.). And each State had its own “unique procedures” for rulemaking and enforcement, making it “impossible” to keep the “different racing jurisdictions in sync[.]” Jockey Club, *Vision 2025: To Prosper, Horse Racing Needs Comprehensive Reform 2* (2019), <https://bit.ly/2Uf8FF3>. As a result, the Thoroughbred industry labored under a “patchwork of conflicting and inconsistent State-based rules governing prohibited substances, lab accreditation, testing, and penalties for violations.” 166 Cong. Rec. H4982 (daily ed. Sept. 29, 2020) (statement of Rep. Barr).

This patchwork was unsustainable. Industry participants were forced to navigate an increasingly opaque and unfair regulatory minefield as their horses traveled across the country from race to race. Particularly with respect to the regulation of medications and other substances, the States simply could not agree on basic issues regarding which substances to regulate and how to regulate them.

Industry participants who “ship[ped] horses across state lines” had to expend significant resources to avoid “running afoul of another state’s arcane”—and often unpredictable—“doping requirements.” *Legislation to Promote the Health and Safety of Racehorses: Hearing Before the Subcomm. on Consumer Prot. & Com. of the H. Comm. on Energy & Com.*, 116th Cong. 31 (2020) (2020 House Hearing), <https://bit.ly/3s3g4HY> (statement of Joe De Francis, Chairman, National Horseracing Advisory Council of the Humane Society of the United States). And enforcement efforts were just as unpredictable, with state racing commissions failing to employ consistent laboratory testing standards² or misunderstanding (or ignoring) their own rules.³ Ultimately, “the differences in standards and arbitrariness in enforcement” thwarted rules designed to protect the health and safety of racehorses. Alicia Hughes, *HISA Claiming Rules Bring Horses Consistent Protection*, BloodHorse (Mar. 11, 2024), <https://perma.cc/MA3Y-QAUV>.

Although state racing commissions recognized the problems with this chaotic regulatory environment, they were unable to achieve any sort of uniformity on their own. The closest they came was the National Uniform Medication Program (NUMP), an initiative introduced in the early 2010s that sought to standardize four components of anti-doping and medication-control regulation. *See 2020 House*

² *See, e.g.*, Natalie Voss, *Spike in Corticosteroid Tests Highlights Growing Pains in New Mexico*, Paulick Report (Feb. 21, 2019), <https://bit.ly/3zcKt5w>.

³ *See, e.g.*, *Farina v. Ohio State Racing Comm’n*, 145 N.E.3d 1108, 1110-12 (Ohio Ct. App. 2019); *cf.* Gus Garcia-Roberts, *Officials Worked Secretly to Clear Bob Baffert’s Justify Amid 2018 Triple Crown Run, Records Show*, Wash. Post (June 29, 2021), <https://wapo.st/3fY0gh0>.

Hearing 14-15 (statement of William M. Lear, Jr., Vice Chairman, The Jockey Club). But even that initiative failed—nearly a decade later, the States’ adoption of these components was at best “erratic” and “incomplete.” *Id.* at 15.

The regulatory patchwork also prevented industry-wide responses to a series of national controversies involving highly publicized horse-doping incidents⁴ and unprecedented racetrack injuries and fatalities.⁵ These and other high-profile controversies prompted widespread concern about the safety and integrity of horseracing, with some going as far as to “call[] for this sport to be abolished altogether.” 166 Cong. Rec. S5514 (daily ed. Sept. 9, 2020) (statement of Sen. McConnell). Put simply, without uniformity, the sport “face[d] an existential threat.” *2020 House Hearing* 16 (statement of William M. Lear, Jr.).

2. Enter HISA. Enacted in 2020 with bipartisan support in Congress and “the support of the overwhelming majority of . . . the horseracing industry,” 166 Cong. Rec. H4981 (daily ed. Sept. 29, 2020) (statement of Rep. Tonko), HISA ushers in a national regulatory regime that provides much-needed centralization and uniformity in medication-control and racetrack-safety governance. This regime is overseen by the FTC, and it leverages the expertise of the Authority—a private, standard-setting

⁴ See, e.g., Joe Drape, *Justify Failed a Drug Test Before Winning the Triple Crown*, N.Y. Times (Sept. 11, 2019), <https://nyti.ms/3AE9S8l>; Chuck Culpepper, *Medina Spirit, the Kentucky Derby Winner, Heads into the Preakness Under a Cloud After Drug Test*, Wash. Post (May 10, 2021), <https://wapo.st/3sfSAv6>; Press Release, U.S. Attorney’s Office for the Southern District of New York, *Manhattan U.S. Attorney Charges 27 Defendants in Racehorse Doping Rings* (Mar. 9, 2020), <https://bit.ly/3jKZ6q4>.

⁵ See, e.g., Joe Drape, *Santa Anita Park’s Death Toll Reaches 30 Racehorses*, N.Y. Times (June 22, 2019), <https://nyti.ms/3saVJfZ>.

body composed of both independent individuals and industry experts that represent various equine constituencies. *See* 15 U.S.C. §§ 3052-3053.

HISA's focus on uniformity is relentless. HISA calls for "uniform standards" regarding medications, *id.* § 3055(c)(1); uniform standards regarding testing protocols and laboratory accreditation, *id.* § 3057(b)(1); and a "uniform set" of standards regarding "training and racing safety" and "track safety," *id.* § 3056(b)(2), (b)(4). These standards are promulgated through a uniform rulemaking process. *Id.* § 3053(b). And HISA requires the creation of a uniform "disciplinary process" for enforcing "safety, performance, and anti-doping and medication control rule[s]," *id.* § 3057(c)(1)(B); uniform rules within the enforcement proceedings, *id.* § 3057(c)(2); "uniform rules" regarding "sanctions," *id.* § 3057(d)(1); and a uniform review process, *id.* § 3058. This uniformity eliminates much of the unfairness and unpredictability inherent in the state-by-state regulatory approach to horseracing.

HISA also improves the due process protections afforded to regulated parties. Those improvements begin with the uniformity described above, which promotes nationwide clarity and consistency—two fundamental pillars of due process. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). And HISA installs several "procedural mechanism[s]" that safeguard the due process rights of regulated parties. *Barry v. Barchi*, 443 U.S. 55, 68 (1979). HISA provides interested parties multiple opportunities to comment on proposed rules. *See* 15 U.S.C. § 3053(b); 16 C.F.R. § 1.142(f). With respect to enforcement, HISA requires "rules and process[es]" that guarantee "adequate due process, including impartial hearing officers or tribunals

commensurate with the seriousness of the alleged safety, performance, or anti-doping and medication control rule violation and the possible civil sanctions for such violation,” 15 U.S.C. § 3057(c)(2)-(3), followed by multiple layers of FTC review, *id.* § 3058. And HISA grants the FTC plenary rulemaking power, confirming that the FTC exercises oversight and control over all aspects of the program’s rulemaking and enforcement. *Id.* § 3053(e).

3. HISA’s regulatory regime has been in place now for more than two years. And even in that relatively short amount of time, HISA is already “well on its way to providing the positive reforms Thoroughbred racing has needed for a long time.” Nat’l Thoroughbred Racing Ass’n, *Thoroughbred Industry Reiterates Support of HISA*, Past the Wire (July 13, 2023), <https://perma.cc/5VLK-4F5G>.

Over the past two years, the FTC has approved, and the industry has grown accustomed to, several regulations that together establish a national, uniform regulatory regime governing racetrack safety and anti-doping and medication control.⁶ And the Authority has invested significant resources setting up the infrastructure necessary for this regime to operate smoothly while also implementing tools to keep up with developments in the sport, including multiple databases to capture nationwide health and safety data for horses and jockeys, science-informed health and safety protocols grounded in national data, and an array of online and on-

⁶ See, e.g., *Horseracing Integrity and Safety Act: Anti-Doping and Medication Control Rule*, 88 Fed. Reg. 27,894 (May 3, 2023); FTC, *Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* (Mar. 27, 2023), <https://perma.cc/2SJ3-MBA9>; FTC, *Order Ratifying Previous Commission Orders as to Horseracing Integrity and Safety Authority’s Rules* (Jan. 3, 2023), <https://perma.cc/6NKY-DRUV>.

the-track initiatives designed to facilitate an open dialogue with industry participants. *See, e.g.,* Press Release, Horseracing Integrity & Safety Auth., *HISA Makes Significant Strides in First Year of Implementation* (July 11, 2023), <https://bit.ly/3Qwv5wa>.

As a testament to these efforts, HISA’s implementation over the past two-plus years has been successful. As the Authority details in its application, racing-related equine fatality rates have dropped by nearly 50 percent as compared to pre-HISA figures, industry participants have largely embraced HISA’s standardized rules and predictable enforcement framework, and wagering fans have greater confidence in the integrity of the races. Appl. 23-26. In short, the Thoroughbred industry has adjusted to this regime, and “[t]here’s no denying HISA’s impact in making the industry safer.” C.L. Brown, *Horse Racing Needs Unity, but Road to Getting There May Be Long as Battles Continue*, Louisville Courier Journal (July 9, 2024), <https://perma.cc/KR9G-9A6E>.

B. The Fifth Circuit’s Facial Invalidation Of HISA’s Enforcement Provisions Threatens Substantial Harm To The Thoroughbred Industry

Departing from the Sixth and Eighth Circuits, the Fifth Circuit’s decision in this case invalidated HISA’s entire enforcement framework as unconstitutional. Appl. App. 15a-29a; *compare Oklahoma*, 62 F.4th at 231-33 (rejecting identical challenge); *Walmsley v. FTC*, — F.4th —, 2024 WL 4248221, at *3-4 (8th Cir. Sept. 20, 2024) (same). If allowed to stand, the Fifth Circuit’s decision will deal not just a major blow to an Act of Congress, but a major blow to the horseracing industry,

upending years of successful implementation efforts and returning the industry to regulatory disarray. But regardless of how this Court ultimately decides this case, it is crucial that the Court stay the Fifth Circuit’s mandate now to avoid a massive—and potentially unnecessary—regulatory upheaval before the Court has had a chance to weigh in.

As an initial matter, the blast radius of the Fifth Circuit’s decision is as broad as possible—it will destabilize Thoroughbred horseracing nationwide. Indeed, by “declar[ing] that HISA’s enforcement provisions are facially unconstitutional,” Appl. App. 3a (capitalization altered), the effect of the Fifth Circuit’s decision is “akin to a universal injunction,” *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2416 (2024) (Thomas, J., concurring in the judgment), “meaning that [the statutory provisions] cannot be applied to anyone at any time under any circumstances,” *id.* at 2428 (Alito, J., concurring in the judgment). Thus, without a stay, the Fifth Circuit’s decision threatens to override the decisions by the Sixth and Eighth Circuits and render HISA’s enforcement provisions inoperative at races across the country during this Court’s review.⁷

The disruptive consequences of that result are obvious: HISA-regulated races nationwide would be governed by HISA rules without any concrete mechanism for enforcing them. To be clear, even under the Fifth Circuit’s decision, participants in

⁷ Attempts to cabin the Fifth Circuit’s decision so that it applies only to respondents’ members would create more problems. Respondents purportedly have thousands of members that span the country, *see* Appl. App. 15a, and drawing that kind of line would introduce the untenable prospect that the rules may be enforced differently for participants—even participants *in the same race*—depending on whether they have some connection to one of the respondent associations. *See* Appl. 28.

these races are still subject to HISA rules: The Fifth Circuit held that HISA's rulemaking provisions are constitutional, Appl. App. 8a-12a, and HISA-promulgated rules preempt state rules governing racetrack safety and medication control, *see* 15 U.S.C. § 3054(b), (k). But the Fifth Circuit's decision leaves the enforcement of those rules up in the air. The court declared that the Authority cannot exercise its statutory enforcement responsibilities as a constitutional matter, Appl. App. 18a-22a, and interpreted HISA's "statutory division of labor" in a way that seemingly forecloses the FTC from taking on those responsibilities itself, *id.* at 22a-25a.

The only other entities that could conceivably exercise enforcement authority under HISA are "State racing commissions" that have voluntarily agreed to provide "services consistent with the enforcement" of HISA rules. 15 U.S.C. § 3054(e)(2)(A). Even assuming these statutory provisions survive the Fifth Circuit's decision, *but see* Appl. App. 17a-18a n.11, leaving the enforcement of federal rules solely in the hands of state racing commissions is not a viable alternative. Congress passed HISA in part because state racing commissions could not fairly and uniformly enforce horseracing regulations on their own. *See supra* at 4-6. There is little reason to believe that state racing commissions will suddenly be able (let alone willing) to do so now. And as the Authority applicants have explained, several state racing commissions have restructured their operations and resources in the wake of HISA's implementation in a way that assumes federal enforcement of HISA rules. Appl. 27. Saddling state racing commissions with enforcement responsibilities is certainly not an immediately feasible interim solution. Ultimately, without a stay, wiping out HISA's enforcement

provisions threatens to create a regulatory “Wild West” where, in practice, the governing rules are not enforced at all. Dan Ross, *Lucinda Finley Q&A on the Fifth Circuit Bombshell*, Thoroughbred Daily News (July 7, 2024), <https://perma.cc/J2WT-KFG6>.

The absence of a functioning enforcement regime would be intolerable for any sport, and Thoroughbred horseracing is no exception. Bad actors may try to exploit the regulatory vacuum as an opportunity to cheat, or cut corners when it comes to safety, running on the harmful—and potentially deadly—idea that “nobody can enforce the rules, so go dope your horses to your heart’s content.” *Id.* And regardless of the extent to which would-be cheaters are actually able to evade the rules, the *risk* of cheating and non-enforcement would damage the integrity of the competition for everyone involved, as it would leave rule-following participants uncertain about whether (and to what extent) their competitors are following the same rules.

As a practical matter, moreover, scrambling to replace HISA’s enforcement provisions with some sort of makeshift enforcement regime during the pendency of these proceedings would create massive confusion for Thoroughbred industry participants. For example, the anti-doping and medication control rules require participants to comply with a reticulated series of stringent, and often time-sensitive, testing and reporting obligations. *See generally* 88 Fed. Reg. 5070 (Jan. 26, 2023). All of those obligations, however, assume the validity of the Authority’s statutory enforcement duties. Thus, even if it were ultimately possible for state racing commissions to take over enforcement responsibilities, the rules themselves would

have to be substantially revamped, and industry participants would be left trying to figure out how to comply with their various regulatory obligations in the meantime. As the FTC has explained, “substantial [regulatory] uncertainty . . . creates an appreciable risk of errors, confusion, and inconsistent treatment of similarly situated horses—harms that could frustrate the purposes of the Act.” 88 Fed. Reg. 27,894, 27,894-95 (May 3, 2023). There is absolutely no need for the Fifth Circuit’s outlier decision to plunge the Thoroughbred industry into regulatory chaos before this Court has had a full opportunity to review.

* * * * *

HISA reflects a widely supported, bipartisan effort to bring desperately needed uniformity and transparency to Thoroughbred horseracing in this country, and Congress has taken great care to ensure that the regulatory scheme is constitutionally sound. “Given the presumption of constitutionality granted to all Acts of Congress,” and given the Thoroughbred industry’s reliance on HISA’s implementation, it is not only “appropriate” but imperative “that the statute remain in effect pending [this Court’s] review.” *Bowen v. Kendrick*, 483 U.S. 1304, 1304-05 (1987) (Rehnquist, C.J., in chambers) (citation omitted). The Court should accordingly stay the Fifth Circuit’s mandate and preserve the status quo.

CONCLUSION

The application for a stay of the Fifth Circuit's mandate should be granted.

Respectfully submitted,

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**APPENDIX:
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Craig Bandoroff, Thoroughbred owner and breeder.

Gary Barber, Thoroughbred owner and breeder.

Reynolds Bell, Jr., Thoroughbred owner and breeder.

Antony Beck, Thoroughbred owner and breeder.

Dr. Jeffrey Berk, Thoroughbred veterinarian; former Chairman of the American Association of Equine Practitioners.

Breeders' Cup Ltd., operator of the Breeders' Cup World Championships series of Thoroughbred races.

Donna Brothers, NBC Sports commentator; Thoroughbred jockey (retired).

Mark Casse, Thoroughbred trainer; inductee of the U.S. National Museum of Racing Hall of Fame.

Robert Clay, Thoroughbred owner and breeder.

Everett Dobson, Thoroughbred owner and breeder.

C. Steven Duncker, Thoroughbred owner and breeder.

Terry Finley, Thoroughbred owner and breeder.

Robert Andrew Fleming, President and CEO, Breeders' Cup Ltd.

James L. Gagliano, President and Chief Operating Officer, The Jockey Club.

Jonathan Green, Thoroughbred owner and breeder.

Arthur Hancock, Thoroughbred owner and breeder.

Seth Walker Hancock, Jr., Thoroughbred owner and breeder.

Fred W. Hertrich III, Thoroughbred owner and breeder.

Ian Highet, Thoroughbred owner and breeder.

Barry Irwin, Thoroughbred owner and breeder.

Stuart S. Janney III, Chairman, The Jockey Club; Thoroughbred owner and breeder.

The Jockey Club, leading Thoroughbred breeding and racing organization in the United States.

Christopher McCarron, Thoroughbred jockey (retired); inductee of the U.S. National Museum of Racing Hall of Fame.

Daniel Metzger, President, Thoroughbred Owners and Breeders Association.

Chauncey O. Morris, Executive Director, Kentucky Thoroughbred Association.

J. Michael O'Farrell, Jr., Thoroughbred owner and breeder.

Thomas J. Rooney, President and CEO, National Thoroughbred Racing Association; former member of the U.S. House of Representatives (2009-2019).

George Strawbridge, Thoroughbred owner and breeder.

Vincent Viola, Thoroughbred owner and breeder.